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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the above-named petitioner, Julia Obartuch, and presents her petition for a rehearing of the petition for certiorari in this case.

The petition for certiorari was filed December 31, 1940, and was denied on March 3, 1941. This petition is filed within less than twenty-five days thereafter, under Rule 33.

Reasons for Petition for Rehearing.

Petitioner is frank to state that, in filing this petition for reconsideration of the order denying certiorari, she is motivated by self-interest to secure a review of the judgments below by which she has been deprived of more than $20,000 of insurance on her husband's life and for which nearly $5,000 in premiums was paid to the respondent company in less than three and one-half years.

Petitioner is aware, however, of the fact that the purpose of review by certiorari in this Court is not to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of public importance. (*Magnum Import Co.* v. *Coty,* 262 U. S. 159.) On re-analysis, it is believed that the petition for certiorari and the supporting brief, in reliance upon the apparent conflict between circuits, did not adequately emphasize the intrinsically important question raised upon this record as to the construction of the incontestable clause in the policies in suit.

The judgments below denying recovery on these policies nullified the declared purpose and effect of the clause providing that the policy *and the application therefor* shall be incontestable after two years (R. 73, 74). This result was predicated upon the acceptance of the testimony of respondent's medical examiner denying that he had examined the insured, Frank Obartuch, by permitting such examiner to contradict orally his own signed statement in the policy that he had examined Frank Obartuch, whose genuine signature was attached to the medical application so authenticated by this examiner's certificate.

The decision of the Court below holding admissible the testimony of this examiner denying his certificate in the policy seemed to present a clear conflict with the decision of the Fifth Circuit Court of Appeals in *New York Life Ins. Co.* v. *Stewart,* 69 F. (2d) 957, 958. In presenting this

conflict as a reason for granting certiorari, we overlooked the fact that the question presented was one controlled by state law, as to which conflict among circuits is not of itself a reason for granting certiorari. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 206.)

The Controlling Question.

The controlling question is therefore not primarily one of conflict among circuits but whether the decision of the Court below permitting the respondent to contest the provisions of the policy and application was probably in conflict with applicable decisions of the Illinois courts interpreting such incontestable clauses.

The Decision of the Court Below Is in Conflict with Applicable Decisions of the Illinois Courts.

The contest of a life insurance policy *containing an application signed by the insured,* after the lapse of the two year period of contestability, for alleged substitution at the medical examination, is precluded by decisions of the Illinois Supreme Court. In the following cases it was held that the defense of fraud of any nature in procuring the policy is barred by the incontestable clause.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559;
Ramsey v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 595;
Powell v. *Mutual Life Ins. Co.*, 313 Ill. 161, 165.

To establish its defense of alleged fraud in the medical examination, respondent not only contested the policy but was permitted to deny (by its examiner's testimony) the truth of its examiner's signed certificate expressly incorporated in the policy. By the incontestable clause (in addition to the Parol Evidence Rule), under Illinois decisions, the respondent is estopped to deny the facts recited over

its agent's signature in the policy, viz. that Frank Obartuch was examined and that he signed the medical application in the presence of the examiner. This principle is applied in decisions holding that an insurance company may not show that the first premium was not in fact paid (payment being a condition precedent to the validity of the contract by its terms) where the policy recites and acknowledges receipt of such payment.

Provident Life Ins. Co. v. *Fennell,* 49 Ill. 180;
Massachusetts Life Ass'n v. *Sibley,* 158 Ill. 411.

While the Illinois Supreme Court has not applied the incontestable clause in the precise factual situation here presented, its decisions construing such clauses as meaning incontestable in fact for any fraudulent procurement are applicable. The decision of the Court below is in conflict with such applicable decisions.

Public Importance.

The question here presented is important for the following reasonings:

(a) It involves the application of the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, that decisions of the State court are binding upon the Federal courts on a question of state law and public policy.

(b) It concerns the enforcibility of insurance contracts in a case when the value of the incontestable clause is destroyed by permitting a contest for fraud contrary to the express language of that clause and the decisions of the State court applying such clauses.

(c) As decided by the Court below it allows an insurance company to defeat liability upon an incontestable contract in any case where its medical examiner will testify that his signed certificate to the medical application incorporated in the policy is false, as the predicate of his testi-

mony that he did not examine the person who signed that application.

In these respects, especially the latter, the record presents a question of extreme importance to the public generally and not an attempt to secure a further review by the defeated party below. Whether parol evidence is admissible to contradict the provisions of a contract is only one phase of the broader question of the effect of the incontestable clause as precluding the contest of the policy and the contradiction of its provisions by which recovery was denied in this case.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of March 3, 1941 denying the petition for certiorari be revoked; and that the writ of certiorari issue.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, DONALD N. SCHAFFER, one of the attorneys for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

DONALD N. SCHAFFER.